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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1983

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KENNETH E. HOLLIS - - - - Petitioner

*versus*

UNITED STATES OF AMERICA - - Respondent

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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51 pp

## QUESTIONS PRESENTED

1. Whether the Court of Appeals violated petitioner's due process and jury trial rights by affirming on a theory of Hobbs Act jurisdiction which the government did not advance at trial or on appeal?

2. Whether certiorari should be granted to resolve the tension between the appellate rules that courts do not scrutinize the reasoning process of juries, yet they may not affirm on a theory of the case not advanced at trial?

3. Whether certiorari should be granted to establish guidelines to assist trial courts in determining whether the Hobbs Act's commerce requirement has been satisfied?

4. Whether certiorari should be granted to review a decision which effectively extends Hobbs Act coverage to embrace all extortion?

5. Whether certiorari should be granted to review a decision which effectively holds that Hobbs Act jurisdiction may rest on the same acts which form the bases of Travel Act convictions?

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

KENNETH E. HOLLIS - - - - *Petitioner*

*v.*

UNITED STATES OF AMERICA - - *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

The petitioner respectfully prays that a writ of certiorari be issued to review the order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 16, 1984, affirming the petitioner's convictions for violations of Title 18, United States Code, Sections 1951 and 1952.

## OPINION BELOW

The decision of the Court of Appeals affirming the petitioner's judgment of conviction upon a jury verdict was entered and filed on January 10, 1984, and is reported at 725 F. 2d 377 (6th Cir. 1984), and appears in Appendix "A". No written opinion was rendered by the District Court for the Eastern District of Kentucky.

## JURISDICTION

The order of the Court of Appeals for the Sixth Circuit affirming the petitioner's judgment of conviction and sentence was entered and filed on January 16, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 2, 1984, and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under the provisions of Title 28, United States Code, Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS:

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation. . . .

STATUTORY PROVISIONS:

Title 18, United States Code, Section 1951 (the Hobbs Act) provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of

any article or commodity in commerce, by robbery or extortion . . . shall be fined . . . or imprisoned. . . .

(b) As used in this section —

* * * *

(3) The term "commerce" means commerce . . . between any point in a State . . . and any point outside thereof. . . .

Title 18, United States Code, Section 1952 (the Travel Act) provides in pertinent part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(3) otherwise, promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined . . . or imprisoned . . . .

(b) As used in this section, "unlawful activity" means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

## STATEMENT OF THE CASE

On July 7, 1982, a federal Grand Jury in the Eastern District of Kentucky returned a four-count indictment against the petitioner, Kenneth E. Hollis. Count one charged extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. Counts two, three, and four charged

that the petitioner used an interstate facility and traveled in interstate commerce for the purpose of performing extortion in violation of state and federal law, 18 U.S.C. § 1952(a)(3) (The Travel Act).

The Court of Appeals decision recites the salient facts underlying these charges:

> Hollis, General Counsel for the Kentucky Department of Labor from 1976-1980, was convicted of extorting $2100 from Dr. Travis Pugh, a Florida physician, by threatening to withhold payment for Pugh's services unless Pugh returned part of the payment to Hollis. Pugh had performed services for the Kentucky Department of Labor under an agreement made through Hollis.
>
> Pugh and an associate established the I & D Center, a clinic in Kentucky for reading x-rays of potential black lung disease victims for the Kentucky Department of Labor, in April of 1976. Pugh moved his family to Kentucky with the intention of staying one year, but returned to Florida after ten days because there were not enough x-rays to be read in Kentucky. Pugh nonetheless continued to read x-rays in Florida for the Kentucky Department of Labor, receiving x-rays and sending reports by mail and flying to Kentucky whenever needed for depositions.
>
> This contiuued even after the I & D Center closed in September of 1976, although Pugh agreed to allow Hollis to withold one payment to insure Pugh's return to Kentucky whenever depositions were needed. Pugh notified Hollis that he would no longer do any work for the Kentucky Department of Labor in early February of 1977 and returned

> to Kentucky for the last group of depositions later that month. The bill for that final group of depositions was $5000.
>
> Pugh testified that in October of 1977 Hollis called him and threatened to hold his check for $5000 for another six months to a year unless he gave Hollis half the amount of the check. Because Pugh needed the money immediately, he testified, he finally agreed to pay Hollis $2100. Hollis called Pugh again two days later to make travel arrangements, and a few days after the initial call he flew to Florida, where Pugh picked Hollis up at the airport. The two then drove to Pugh's bank, where Pugh deposited the $5000 check Hollis had brought him, immediately withdrew $2100 cash, and gave the cash to Hollis. Hollis then returned to Kentucky.

725 F. 2d at 378.

Hollis urged that the Government had failed to satisfy the Hobbs Act's commerce requirement. This contention was raised at the close of the government's case-in-chief, at the close of all of the evidence, and on motion for a new trial.[1] At the close of its case-in-chief, the government abandoned its attempt to prove

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[1]The theory on which the Court of Appeals based its decision was not advanced by the Government in the bill of particulars (Appendix "D"), or in the arguments made in response to the motion for judgment of acquittal at the close of the government's case-in-chief (Appendix "E") and at the close of all the evidence (Appendix "F"), or on motion for a new trial (Appendix "G"). The trial judge overruled the motion without comment in each instance.

a violation of state extortion laws.[2] Thereafter, the government's proof rested on acts which formed the bases of Travel Act violations and on events which occurred long before the extortion. And on each occasion, the trial court overruled petitioner's motion without comemnt.

In the Court of Appeals, Hollis explained:

> Appellee points to only five places in the record in an attempt to show that commerce was affected. Three of the references (Br. 17-18) relate to events which occurred long before the alleged extortion; the others are Hollis' phone calls and flight to Florida. (Br. 18). Hollis has explained in detail (Br. 35-39) why the jurisdictional requirement may not be predicated on Travel Act violations. Appellee is completely non-responsive. . . .
>
> The only other evidence relates to events which occurred at least [eight] months before the alleged extortion. . . . As the Court explained in *United States* v. *Staszcuk,* 517 F. 2d 53, 60 (7th Cir.), *cert. denied,* 423 U. S. 837 (1975) . . . '[t]he jurisdictional inquiry must, of course, focus on the situation *at the time of the offense.*' [Emphasis added]. Accordingly, the three references to activities which occurred at least [eight] months before the alleged extortion may not constitute the basis of Hobbs Act jurisdiction.

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[2]Hence, as the Court of Appeals correctly ruled, "the Travel Act convictions were based entirely on the Federal Hobbs Act violation. Accordingly, if the Hobbs Act conviction is reversed so must be the Travel Act convictions." 725 F. 2d at 378 n. 3.

(Reply Br. at 5-6). The Sixth Circuit nonetheless affirmed, but did not directly address the questions Hollis presented for review.

The principal theory of jurisdiction advanced by the government at trial and on appeal was based on the Travel Act violations. Yet the United States did not dispute Hollis' contention that Hobbs Act jurisdiction may not properly rest on the same acts which form the bases of Travel Act violations. The Court of Appeals skirted the issue: "We need not consider whether the acts that formed the bases of the Travel Act violations (telephone calls and an airplane trip to Florida made by Hollis) . . . could constitute a sufficient effect on commerce." 725 F. 2d at 381 n. 7.

The Court instead predicated Hobbs Act jurisdiction on a novel theory which the government did not advance at trial or on appeal. Relying on Sherman Act definitions of commerce, the panel held that Dr. Pugh's medical services to the Commonwealth of Kentucky, and the Commonwealth's payment therefor, constituted the affected commerce. 725 F. 2d at 380. The Court reasoned:

> The transaction between Pugh and Hollis could also be characterized as receipt by Pugh of $5,000 followed by a $2,100 payment from Pugh to Hollis. The $2,100 payment to Hollis was also commerce, however, since Hollis immediately took the money from Florida back to Kentucky. The practical effect of the extortion is the same under either characterization: instead of $5,000 moving from Kentucky to Florida, only $2,900 ends up in Florida.

*Id.* n. 5. The Court also opined, in dicta, that the Hobbs Act "is broad enough to include even effect on commerce that occur long before the extortion." 725 F. 2d at 380.

Hollis urged the Court to reconsider its decision since, *inter alia,* it violated his due process and jury trial rights by affirming on a theory which the government did not advance at trial or on appeal. *Dunn* v. *United States,* 442 U. S. 100 (1979). The Court denied the petition for rehearing without comment (Appendix "B"), but granted until April 16, 1984, a motion to stay the mandate pending application for writ of certiorari (Appendix "C").

## REASONS FOR GRANTING THE WRIT

### I. The Court of Appeals Violated Petitioner's Due Process and Jury Trial Rights by Affirming on a Theory of Hobbs Act Jurisdiction Which the Government Did Not Advance at Trial or on Appeal.

An appellate court's affirmance of a conviction based on a theory which was neither alleged nor submitted to the jury violations due process. *Dunn* v. *United States,* 442 U. S. 100 (1979). Dunn was indicted of making false declarations to a grand jury. The indictment charged that Dunn's grand jury testimony was inconsistent with statements made during ancillary proceedings on September 30, 1976. "That was also the theory on which the case was tried and submitted to the jury." 442 U. S. at 106. The Tenth Circuit affirmed Dunn's conviction on the ground that his grand jury testimony was inconsistent with state-

ments made on October 21, 1976. The Court reasoned that since Dunn's "October 21 *testimony* was 'inextricably related' to his September 30 declaration . . . [Dunn] could have anticipated that the prosecution would introduce the October testimony." *Id.* at 105.

The Supreme Court held, *inter alia:*

> But while there was no variance between the indictment and proof at trial, there was a discrepancy between the basis on which the jury rendered its verdict and that on which the Court of Appeals sustained [Dunn's] conviction. Whereas the jury was instructed to rest its decision on Dunn's September statement, the Tenth Circuit predicated its affirmance on [Dunn's] October testimony. The Government concedes that this ruling was erroneous. . . .
>
> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. [Citations omitted]. There is, to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal. The jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. But the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.

*Id.* at 106-107. *Accord: Cole* v. *Arkansas,* 333 U. S. 196, 201-202 (1948) ("To conform to due process of law, petitioners were entitled to have validity of their convictions appraised on consideration of the case as it was tried as the issues were determined in the trial court."). *See also Presnell* v. *Georgia,* 439 U. S. 14 (1978); *Gregory* v. *Chicago,* 394 U. S. 111, 122-24 (1969) (Black, J., concurring); *Spevack* v. *Klein,* 385 U. S. 511, 518 (1967).

The *Dunn* rationale applies *a fortiori* in this case. Unlike the situation in *Dunn,* there is a "glaring distinction between the Government's theory at trial and the [Sixth] Circuit's analysis on appeal." In addition, "the validity of the [Court's] theory is not self-evident. Had the government unveiled it at trial, [petitioner] would have had respectable grounds to try to contest it." *United States* v. *Parrilla Bonilla,* 648 F. 2d 1373, 1384 (1st Cir. 1981). Petitioner did in fact contest the validity of the Court's theories in his petition for rehearing *en banc;* yet the Court denied the petition without comment. Finally, *Dunn* is dispositive since the Court of Appeals' decision constitutes an implicit concession that the evidence was insufficient to support the Hobbs Act conviction on the theory on which it was obtained. *See Parrilla Bonilla,* 648 F. 2d at 1386.

The Court of Appeals, acting with the wisdom of hindsight, determined that the evidence was sufficient both to invoke federal jurisdiction and to prove a substantive element of the Hobbs Act offense. Yet to say that the jury considered the novel theory on which

the Court based its decision is to engage in gross fiction. As Hollis urged in his petition for rehearing *en banc,* the Court of Appeals effectively took judicial notice that the government proved the requisite effect on commerce:

> When an appellate court concludes that the evidence is sufficient to satisfy a theory which was not advanced by the Government, it effectively takes judicial notice that the evidence itself exists. For without a theory linking the facts to some basis for invoking federal jurisdiction, the evidence is insufficient. The raw facts themselves provide no basis for federal jurisdiction. It is only because the panel skillfully constructs a theory which the facts will support that it concludes the evidence is sufficient.

[Footnote omitted]. Petition for Rehearing, p. 9.

In sum, it is manifest that the Court of Appeals affirmed Hollis' Hobbs Act conviction on grounds which the government did not advance at trial or on appeal. The Court of Appeals decision therefore violated Hollis' right to due process both at trial and on appeal. Since the theory on which the Court concluded the evidence was sufficient was first unveiled in the Court of Appeals decision itself, petitioner was also denied the right to contest the theory in the Sixth Circuit. Certiorari should be granted to review a judgment which squarely conflicts with the mandates of the Constitution and this Court.

**II. Certiorari Should Be Granted to Resolve the Tension Between the Appellate Rules That Courts Do Not Scrutinize the Reasoning Process of Juries, Yet They May Not Affirm on a Theory of the Case Not Advanced at Trial.**

If *Dunn* does not demand that petitioner's Hobbs Act conviction be vacated, it must be because the theory on which the Court of Appeals affirmed was in fact advanced at trial. One might argue that the Court viewed the evidence in the light most favorable to the verdict and concluded that a rational jury could have found the requisite effect on commerce based on the theory advanced in the Court's decision. If so, this case underscores a tension between two important appellate principles: courts do not scrutinize the reasoning process of juries;[3] yet they may not affirm on a theory of the case not advanced at trial.

This tension could be obviated simply by saying that *Dunn* must yield to the rule that courts do not scrutinize the reasoning process of juries. The Court of Appeals apparently took such an approach in this case by refusing to grant Hollis' petition for rehearing. Other Circuits, however, have resolved this tension in favor of the defendant-appellant's constitutional rights.

In *United States* v. *Patrin*, 575 F. 2d 708 (9th Cir. 1978), a pre-*Dunn* decision, the Court reversed convic-

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[3]*See, e.g., Jackson* v. *Virginia*, 443 U. S. 307, 319 n. 13 (1979) ("the standard announced today . . . does not require scrutiny of the reasoning process actually used by the factfinder — if known."); *Dunn* v. *United States*, 284 U. S. 390 (1932) (inconsistent verdicts permissible).

tions of assaulting Forest Service employees for want of subject matter jurisdiction. 18 U.S.C. § 1114 "define[s] two categories of federal employees. The first . . . [is] the 'game category'." 575 F. 2d at 710-11. "[Throughout the trial . . . the government believed it could validly prosecute the Patrins only under the animal disease category." *Id.* at 711. On appeal, however, the government cited authority which sanctioned prosecution under the game category.

The Ninth Circuit framed the issue as follows: "whether the government, having disavowed any intent to rely upon the game prosecution category during trial, can now invoke that section for the first time. We hold that it cannot." *Id.* at 711. Citing *Singleton* v. *Wulff*, 428 U. S. 106, 120 (1976), the Court explained that "a federal appellate court does not consider an issue not passed upon below." *Id.* at 712.

*Patrin* turned not on insufficiency of the evidence, but rather on the issue of subject matter jurisdiction. *Patrin* therefore should apply *a fortiori* to the issue of evidence insufficiency. Since jurisdiction is a question for the court, the Ninth Circuit arguably had inherent authority to invoke the game protection category and affirm the convictions. But the Court was reluctant to rely on hindsight:

> We are not convinced that the Patrins would not have conducted their defense differently had the prosecutor argued for the application of the game protection category instead of or in addition to the animal disease category of § 1114. At the very least, factual or legal challanges to the application

> and continuing validity of the 38 year-old designation . . . could have been raised and explored.

*Id.* at 712-13.

The First Circuit has extended *Dunn's* application to cases "where the evidence is concededly insufficient to support the convictions below on the theory on which they were obtained." *United States* v. *Parrilla Bonilla,* 648 F. 2d 1373, 1386 (1st Cir. 1981). Defendants were convicted of "entering a restricted naval reservation 'for the purpose' of entering without authorization." 648 F. 2d at 1377. Defendants contended at trial and on appeal that the government failed to prove that defendants were within the territorial borders of a "military reservation."

The government "substantially changed its tack" on appeal. *Id.* at 1384. It "conceded that 'if, in fact, the ordinary high tide line is the boundary of the base, then the government failed to prove [appellants] crossed it.' . . . the government now maintains that Camp Garcia encompasses Blue Beach in its entirety, so that it is immaterial where on the beach appellants were shown to have located." *Id.*

The First Circuit explained:

> The government's recent position may well, for all we know, be correct. The difficulty is, it was never presented in or to the district court, and therefore comes to this appellate tribunal without benefit of findings or rulings below, and without defendants' having had the chance to confront it at trial. Moreover, the validity of the government's present theory is not self-evident. Had the

> government unveiled it at trial, appellants would have had respectable grounds to try to contest it.

*Id.* at 1384.

The Court cited two reasons for its decision to reverse. The Court explained that affirmance would violate *Dunn* and other Supreme Court precedent. In addition, the Court, citing *inter alia, Patrin, supra,* concluded:

> We think 'the fundamental concept that issues on appeal are to be confined to those duly presented to the trial court,' [citation omitted] has force in a criminal proceeding such as this where the evidence is concededly insufficient to support the convictions below on the theory on which they were obtained. [Footnote omitted].
>
> We hold only that the government failed to prove its case on the theories it advanced before the district court, and that it is now too late to save these prosecutions through advancement of a different 'theory of the case.' [Footnote omitted].

*Id.* at 1386.

In a similar vein, the Circuit Courts of Appeal, including the Sixth Circuit, have refused to take judicial notice of patent truths because of the concern for guaranteeing the right to trial by jury on every element of an offense. *See e.g., United States* v. *Dior,* 671 F. 2d 351, 357-58 (9th Cir. 1982) (refusing to take judicial notice of American/Canadian Exchange rate where value is an essential element of a crime); *United States* v. *Bliss,* 642 F. 2d 390, 392 (10th Cir. 1981)

(defendant's post-verdict concession that bank was a "national bank" "cannot be considered as evidence necessary to sustain a jury's verdict."); *United States* v. *Jones,* 580 F. 2d 219, 223-224 (6th Cir. 1978) (to take judicial notice that South Central Bell is an interstate communication facility would deprive the defendant of his right to have the jury "ignore even uncontroverted facts in reaching a verdict."). The Court of Appeals decision in this case squarely conflicts with the rationale underlying the reasons courts are loathe to take judicial notice on appeal. The Court should have avoided the temptation to construct a theory which the evidence *did* support, even if a "rational jury" conceivably might have based its decision on that theory. Certiorari should be granted to guide appellate courts in resolving the tension between two rules which courts apply in countless criminal appeals.

**III. Certiorari Should Be Granted to Establish Guidelines to Assist Trial Courts in Determining Whether the Hobbs Act's Commerce Requirement Has Been Satisfied.**

The Hobbs Act's commerce requirement is unique in at least two significant respects. First, it is both a jurisdictional prerequisite and a substantive element of the crime. Accordingly, the Fifth Circuit has explained:

> At the evidentiary stage of the trial there is nothing unique about the commerce issue as a 'jurisdictional element'. The issue does however impose a great responsibility on the trial court to proceed with caution because interference with

> interstate commerce is the element of the conduct here that enabled Congress to declare that common law extortion can be a federal crime. And the words 'affect interstate comerce' . . . require a legal conclusion based on the facts presented to the jury.

*United States* v. *Hyde,* 448 F. 2d 815, 839 n. 34 (5th Cir. 1971), *cert. denied,* 404 U. S. 1058 (1972). As then-judge Stevens wrote for an *en banc* Court of the Seventh Circuit:

> The question is novel and significant. The extraordinary growth of federal criminal litigation poses a serious threat to the quality of federal justice; moreover, this growth may not only reflect but also contribute to the continuing transfer of power from the several states to the national government. Since we have no desire to accelerate this trend unnecessarily, we approach the question with a special regard for appellant's claim that the federal prosecutor has overreached the proper limits of his jurisdiction. The importance of the issue merited the fresh consideration of the court sitting *en banc.* It should be decided neither by simple extrapolation from the precedents on which the government relies nor by merely distinguishing the cases which have not yet carried us this far.

*United States* v. *Staszcuk,* 517 F. 2d 53, 55-56 (7th Cir.), *cert. denied,* 423 U. S. 837 (1975).

The second feature of the commerce requirement is that this element may be satisfied so easily. *Staszcuk* remains the leading decision on the breadth of Hobbs

Act jurisdiction. There the Court held that the Act does not require that commerce be affected in fact, but that "jurisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce." *Staszcuk,* 517 F. 2d at 60. [Footnote omitted].

Further, even a *de minimus* effect on commerce is sufficient to satisfy the Act's requirement. *See, e.g., United States* v. *Mattson,* 671 F. 2d 1020 (7th Cir. 1982). Accordingly, in any given case, the commerce requirement could conceivably be satisfied by any one of numerous theories. *See, e.g., United States* v. *Elders,* 569 F. 2d 1020 (7th Cir. 1978).

As Hollis urged on petition for rehearing *en banc:*

> It is unreasonable to require a defendant-appellant to raise and contest all bases of jurisdiction which the Government could conceivably advance. . . . Given that the jurisdiction element may be proved in an infinite number of ways, it is simply impossible for an appellant to refute all theories, particularly those which the United States doesn't argue. Accordingly, the *Government* must explain why the evidence is sufficient to satisfy the commerce requirement, a substantive element of a Hobbs Act violation.

[Footnote omitted]. Petition for Rehearing, p. 7.

In the Court of Appeals, petitioner relied on two decisions in which the Seventh Circuit declined to base jurisdiction on theories not advanced by the government. In *United States* v. *Elders,* 569 F. 2d 1020 (7th

Cir. 1978), the government advanced four theories on appeal. Rejecting one, the Court explained: "[t]he case was not tried on that theory." *Id.* at 1025. It dismissed another for the same reason: "The inflated price issue was never raised in the trial court. . . . The burden was on the Government to establish Hobbs Act jurisdiction. . . . The government failed to carry its entire burden." *Id.* at 1025-26.

In *United States* v. *Mattson,* 671 F. 2d 1020 (7th Cir. 1982), the victim withdrew $2,000 from checking and savings accounts and borrowed an additional $1,000 to make the extortionate payment. The Seventh Circuit could have found the requisite effect on commerce by the payment of $3,000, since the extortion directly affected the amount of the victim's assets in interstate commerce. The Court, however, concluded that if jurisdiction existed, it "could not conceive of an extortionate transaction which would not be punishable under the Hobbs Act." *Id.* at 1025.

The trial judge was urged on three occasions[4] to determine whether a rational jury could have found the proof sufficient to establish the requisite effect on commerce. *Jackson* v. *Virginia,* 443 U. S. 307, 318-19 (1979). On each occasion, the District Court overruled the motion without comment. Had the trial judge articulated the theory on which the Court of Appeals predicated its affirmance, petitioner could have contested it in the District Court. But since the trial judge did not state on the record the basis for his con-

[4]At the close of the government's case-in-chief, at the close of all the evidence, and on motion for a new trial.

clusion that the government satisfied the commerce requirement, the Court of Appeals was forced either to reverse or to construct a theory which the facts *did* support.

Certiorari should be granted to establish guidelines to assist trial courts in determining whether the government has satisfied the Hobbs Act's commerce requirement. Trial courts should, on appropriate motion, require the United States to articulate the reasons it contends commerce is affected. The trial judge should determine whether the jurisdictional component has been satisfied, and then, whether a rational jury could find the evidence sufficient to support the theories advanced by the government.

This procedure would permit a defendant to test the legal merits of such theories before the jury could consider them. More important, however, it would enable a defendant to challenge the sufficiency of the evidence as it relates to the theories advanced by the government. Such a procedure would minimize the risk that appellate courts would affirm on theories of the case not advanced at trial. Finally, it would facilitate the disposition of claims that the government failed to prove elements involving inquiries in which both judge and jury must engage.

The Court of Appeals decision in this case should be compared with *Mattson* and *Elders,* two decisions cited above in which the Seventh Circuit refused to affirm on theories not advanced at trial. It should also be contrasted with *United States* v. *Boston,* 718 F. 2d 1511, 1516-17 (10th Cir. 1983), a decision in which the

evidence was properly deemed sufficient. In *Boston,* the jury was instructed that it could find the requisite effect on commerce based on any one of three alternative theories. 718 F. 2d at 1516-17. The defendant therefore was permitted a meaningful opportunity to contest the legal merits of the theories and the sufficiency of the evidence both before and after jury deliberation. Had the District Court in this case employed a similar procedure, the Court of Appeals would have been spared the chore of constructing a theory which the facts indeed supported[5]

This case underscores the need for trial courts to state on the record the bases for concluding that the evidence supports legal theories advanced by the government. This need is particularly acute in cases involving mixed inquiries of law and fact. Numerous federal crimes contain elements which involve such mixed inquiries. *See, e.g., United States* v. *Johnson,* 718 F. 2d 1317 (5th Cir. 1983) (en banc); *United States* v. *Parrilla Bonilla,* 648 F. 2d 1373, 1386 (1st Cir. 1981); *United States* v. *Bliss,* 642 F. 2d 390 (10th Cir. 1981). Certiorari should be granted in this case not just to correct the injustice inherent in the decision below, but to establish guidelines to assist trial courts in determining whether the evidence is sufficient

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[5]Petitioner does not contend that trial courts must frame instructions with the precision of the one given in *Boston.* Petitioner instead urges that the government be required to articulate its theories, and that the trial court be required to state on the record the basis for the conclusion that the evidence supports those theories.

to satisfy threshold legal issues such as the Hobbs Act's commerce requirement.

**IV. Certiorari Should Be Granted to Review a Decision Which Effectively Extends Hobbs Act Coverage to Embrace All Extortion.**

The Court of Appeals held that the extortion "affected the amount of payment that moved in interstate commerce." 725 F. 2d at 380. Yet the Court's opinion does not explain how commerce was in fact affected. The $5,000 payment would have moved in commerce absent extortion; $2,100, the extortionate payment, moved in commerce only because Hollis returned to Kentucky. But the fact that "only $2,900 ends up in Florida" (725 F. 2d at 380 n. 5), does not itself suggest that commerce[6] was affected. The Court seems to say that movement in commerce of the extortionate payment is sufficient. Coupled with the "realistic probability" and the *de minimis* rules, *e.g., United States, v. Harding,* 563 F. 2d 299 (6th Cir. 1977), *cert. denied,* 434 U. S. 1062 (1978), the holding embraces all extortion, since there is always a likelihood that the extortionate payment will end up in interstate commerce. And virtually all extortionate payments could be said to affect commerce, for they typically are made in exchange for something which relates to commerce. *See,*

[6]The Court holds that the victim's services and the payment therefore constitute the "commerce" which the extortion affected. Yet it does not explain how commerce, according to this definition, is affected. The extortion affected neither the quality nor quantity of the victim's services; it affected only "the amount of payment that moved in commerce." 725 F. 2d at 380. As noted, all extortion carries the potential to affect the amount of money that moves in commerce.

*e.g., United States* v. *Mattson,* 671 F. 2d 1020 (7th Cir. 1982); *United States* v. *Elders,* 569 F. 2d 1020 (7th Cir. 1978).

The opinion implicitly acknowledged that no decision has based Hobbs Act jurisdiction on the extortionate payment itself. *United States* v. *French,* 628 F. 2d 1069 (8th Cir.), *cert. denied,* 449 U. S. 956 (1980), is apparently the only decision the Court considered analogous to this case. The Court correctly noted that "*French* is not exactly on point with the present case. . . ." 725 F. 2d at 380 n. 6. *French* held that extortion from a business engaged in commerce was sufficient to satisfy the commerce requirements. The victim in *French,* a St. Louis bail bondsman, "acted as agent for a New York insurance firm." 725 F. 2d at 380. The Court explained that "the moment the extortionate payment was made, there was an effect on interstate commerce, whether this effect is characterized as extraction of a wrongful tribute . . . from an interstate enterprise, or as an infusion of corrupt practices into an enterprise whose activities reached across state lines." 628 F. 2d at 1078. The proof that the victim was an interstate enterprise at the time of the extortion constitutes the critical distinction between *French* and this case.[7]

---

[7]In *United States* v. *Mattson,* 671 F. 2d 1020 (7th Cir. 1982), the Court could have reasoned that commerce was affected the moment the victim withdrew $2,000 from checking and savings accounts and borrowed another $1,000. The Court of Appeals' holding seems to suggest that commerce is affected whenever the extortionate payment moves in commerce; in *Mattson,* $3,000 moved from banks into the palms of the defendants.

The Court of Appeals also noted that "[n]either the [Hobbs Act] nor the Constitution requires that the company be engaged in an interstate transaction at the moment of the extortion. . . . *United States* v. *Hyde,* 448 F. 2d 815, 836 (5th Cir., 1971), *cert. denied,* 404 U. S. 1058 (1972)." 725 F. 2d at 380. The Court in *Hyde,* however, held that the government proved the extortion prevented the establishment of businesses "formed . . . with a stated purpose of going into activities that support a finding of interstate commerce." 448 F. 2d at 836. *Hyde* does not, therefore, extend Hobbs Act jurisdiction to include effects on commerce which occurred long before the extortion.

Petitioner stressed in the Court of Appeals that "[t]he jurisdictional inquiry must, of course, focus on the situation *at the time of the offense".* [Emphasis added]. *United States* v. *Staszcuk,* 517 F. 2d 53, 60 (7th Cir.), *cert denied,* 423 U. S. 837 (1975). Petitioner also emphasized (Brief at 38) that:

> We have found no case which extends Hobbs Act jurisdiction so far as to encompass the facts of this case. If a sufficient nexus were found here, we are unable to conceive of an extortionate transaction which would not be punishable under the Hobbs Act. To so hold would mean that the extortion of money from any individual . . . could arguably affect interstate commerce eventually.

*United States* v. *Mattson,* 671 F. 2d 1020, 1025 (7th Cir. 1982).

Certiorari should be granted to review a decision which effectively extends Hobbs Act coverage to embrace all extortion.

**V. Certiorari Should Be Granted to Review a Decision Which Effectively Holds That Hobbs Act Jurisdiction May Rest on the Same Acts Which Form the Basis of Travel Act Convictions.**

The principal theory of jurisdiction advanced by the Government at trial and on appeal was predicated on the Travel Act violations. Yet the United States did not dispute Hollis' contention that jurisdiction may not properly rest on the same acts which form the bases of Travel Act violations. The Court of Appeals skirted the issue: "We need not consider whether the acts that formed the bases of the Travel Act violations (telephone calls and an airplane trip to Florida made by Hollis) . . . could constitute a sufficient effect on commerce."

The Court's holding, however, effectively embraces this theory of jurisdiction. As noted earlier, if the decision holds that the extortionate payment itself affects commerce, then the Act would include virtually all extortion. If, on the other hand, the Court reasons that commerce is affected because the payment moved in interstate commerce, then it effectively holds that jurisdiction may be predicated on the same acts which form the bases of Travel Act convictions.

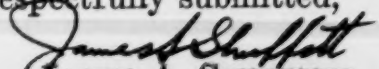
The Court concluded that this is a case of an "extortion of a payment itself in commerce." 725 F. 2d at 380 n. 6. Yet the payment was in commerce *only* because it "traveled" from Kentucky to Florida. Jurisdiction is thus based not on the payment itself, but rather on the fact that Hollis transported the payment and extortionate payment across state lines. Accord-

ingly, this Court should grant certiorari and hold that the Hobbs Act's commerce requirement may not rest solely on the same acts which form the bases of Travel Act convictions.

## CONCLUSION

For any of the reasons set forth above, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Sixth Circuit affirming the petitioner's convictions.

Respectfully submitted,



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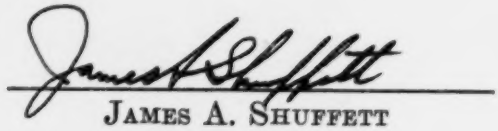
## CERTIFICATE OF SERVICE AND ENTRY OF APPEARANCE

James A. Shuffett hereby certifies that this Writ of Certiorari has been served on the United States by mailing three (3) copies of same, first-class, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C., 20530, on this the 1st day of May, 1984. Supreme Court Rules 28.3, 28.4(a), 28.5(b), 19.3

James A. Shuffett hereby enters an appearance on behalf of the Petitioner, Kenneth E. Hollis. Supreme Court Rules 28.5(b), 19.3.



JAMES A. SHUFFETT

# APPENDIX

## APPENDIX A

No. 83-5071

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

*v.*

KENNETH E. HOLLIS, - - - *Defendant-Appellant.*

---

*On Appeal from the United States District Court for the Eastern District of Kentucky*

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Decided and Filed January 16, 1984

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Before: ENGEL and KENNEDY, Circuit Judges; and MORTON,* Chief District Judge.

KENNEDY, Circuit Judge. Hollis appeals his jury convictions of one count of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951,[1] and three counts of violating the

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*Honorable L. Clure Morton, Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

[1]The Hobbs Act provides in part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . shall be fined . . . or imprisoned . . . .

(b) As used in this section—

. . .

(2) The term "commerce" means commerce . . . between any point in a State . . . and any point outside thereof . . . .

18 U.S.C. § 1951.

Travel Act, 18 U.S.C. § 1952(a)(3).[2] Hollis contends that his convictions must be reversed, among other reasons, because the evidence was insufficient to show the effect on commerce required for a Hobbs Act violation.[3]

Hollis, General Counsel for the Kentucky Department of Labor from 1976-1980, was convicted of extorting $2100 from Dr. Travis Pugh, a Florida physician, by threatening to withhold payment for Pugh's services unless Pugh returned part of the payment to Hollis. Pugh had performed services for the Kentucky Department of Labor under an agreement made through Hollis.

Pugh and an associate established the I & D Center, a clinic in Kentucky for reading x-rays of potential black lung disease victims for the Kentucky Department of Labor, in April of 1976. Pugh moved his family to Kentucky with the intention of staying one year, but returned to Florida

---

[2]The Travel Act provides in part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> . . .
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined . . . or imprisoned . . . .
>
> (b) As used in this section, "unlawful activity" means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

18 U.S.C. § 1952.

[3]Since the government did not prove any violation of state extortion laws, the Travel Act convictions were based entirely on the federal Hobbs Act violation. Accordingly, if the Hobbs Act conviction is reversed so must be the Travel Act convictions.

after ten days because there were not enough x-rays to be read in Kentucky. Pugh nonetheless continued to read x-rays in Florida for the Kentucky Department of Labor, receiving x-rays and sending reports by mail and flying to Kentucky whenever needed for depositions.

This continued even after the I & D Center closed in September of 1976, although Pugh agreed to allow Hollis to withold one payment to insure Pugh's return to Kentucky whenever depositions were needed. Pugh notified Hollis that he would no longer do any work for the Kentucky Department of Labor in early February of 1977 and returned to Kentucky for the last group of depositions later that month. The bill for that final group of depositions was $5000.

Pugh testified that in October of 1977 Hollis called him and threatened to hold up his check for $5000 for another six months to a year unless he gave Hollis half the amount of the check. Because Pugh needed the money immediately, he testified, he finally agreed to pay Hollis $2100. Hollis called Pugh again two days later to make travel arrangements, and a few days after the initial call he flew to Florida, where Pugh picked Hollis up at the airport. The two then drove to Pugh's bank, where Pugh deposited the $5000 check Hollis had brought him, immediately withdrew $2100 cash, and gave the cash to Hollis. Hollis then returned to Kentucky.

The Hobbs Act penalizes "[w]hoever in any way or degree . . . affects commerce . . . by robbery or extortion." 18 U.S.C. § 1951(a). Courts have consistently held that this language requires only a de minimis effect on commerce. *E.g., United States* v. *Richardson,* 596 F. 2d 157 (6th Cir. 1979); *United States* v. *Billups,* 692 F. 2d 320 (4th Cir. 1982); *United States* v. *French,* 628 F. 2d 1069 (7th Cir.), *cert. denied,* 449 U.S. 956 (1980); *United States* v. *Hathaway,* 534 F. 2d 386 (1st Cir.), *cert. denied,* 429 U. S.

819 (1976); *United States* v. *Brown*, 540 F. 2d 364 (8th Cir. 1976). The Supreme Court has said that the Hobbs Act was intended "to use all the constitutional power Congress has to punish interference with interstate commerce." *Stirone* v. *United States*, 361 U. S. 212, 215 (1960), *See also* S. Rep. No. 532, 73d Cong., 2d Sess. 1 (statute designed "to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers") (concerning predecessor of Hobbs Act). And in *United States* v. *Harding*, 563 F. 2d 299, 301-02 (6th Cir. 1977), *cert. denied*, 434 U. S. 1062 (1978), this Court approved the Seventh Circuit's holding in *United States* v. *Staszcuk*, 517 F. 2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U. S. 837 (1975), that it is sufficient that there is a "realistic probability" that the extortion would affect commerce.

A physician's services if interstate in character may constitute commerce. In *Tarleton* v. *Meharry Medical College*, 771 F. 2d 1523, 1531 (6th Cir. 1983), this Court found that movement of patients across state lines to a medical facility constituted commerce. If interstate movement of patients is commerce, we see no reason why the interstate movement of a physician or of his work product would not also be commerce. *Cf. United States* v. *Oregon State Medical Society*, 343 U. S. 326, 338 (1952), (services offered by medical society not commerce since "wholly intrastate"). The Evidence in the present case shows that Pugh, a Florida physician, read x-rays of Kentucky patients in Florida and mailed his reports from Florida to Kentucky. He also traveled from Florida to Kentucky to give depositions. Pugh's services rendered to the Kentucky Department of Labor therefore constituted commerce. Similarly, the payments made by the Kentucky Department of Labor to Pugh were also commerce. *Goldfarb* v. *Virginia State Bar*, 421 U. S. 733, 787-88 (1975) (exchange of attorneys' services

for money is commerce). *Tarleton, supra; Ballard* v. *Blue Shield, Inc.*, 543 F. 2d 1075, 1079 (4th Cir. 1976) ("the payment exchanged for professional services constitutes trade or commerce"), *cert. denied,* 430 U. S. 922 (1977).[4]

Hollis contends that his extortion nonetheless did not affect any of this commerce because at the time of the extortion Pugh had ceased performing services in commerce. Since Pugh had already withdrawn from commerce, and there was no evidence concerning the likelihood that he would re-enter commerce, Hollis argues that the government has not proven any effect on commerce. The parties argue the applicability of various decisions concerning sufficiency of an indirect effect on commerce caused by extortion by or from a business that engages in commerce. *E.g., United States* v. *Mattson,* 671 F. 2d 1020 (7th Cir. 1982). However, the possibility of an indirect effect need not be considered if the extortion had a direct effect on commerce.

Such a direct effect on commerce is evident in the present case. The payments made by the Kentucky Department of Labor to Pugh for his services constituted interstate commerce. Payment for the services was an essential part of the interstate transaction. But for the extortion, Pugh would have been paid $5000 for the final group of deposi-

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[4]All the cases cited in this paragraph involve the meaning of "commerce" under the Sherman Act. However, since the Hobbs Act was intended to use the full congressional power to regulate commerce, *Stirone, supra,* any activity that may constitute commerce under the Sherman Act may also constitute commerce under the Hobbs Act. There is nothing in the Hobbs Act that would restrict its reach to interstate movement of tangible goods. *See United States* v. *Gates,* 616 F. 2d 1103 (9th Cir. 1980) (solicitation of tourist business is commerce under the Hobbs Act).

tions. Because of the extortion, Pugh only received $2100.[5] Hollis' extortion therefore directly affected the amount of payment that moved in interstate commerce.

In *United States* v. *Hyde*, 448 F. 2d 815, 836 (5th Cir. 1971), *cert. denied*, 404 U. S. 1058 (1972), the Fifth Circuit said that "[n]either the [Hobbs Act] nor the Constitution requires that the company be engaged in an interstate transaction at the moment of the extortion to support federal jurisdiction." This is a case where the victim *was* engaged in an interstate transaction at the moment of the extortion, albeit in the payment end rather than the delivery end of the transaction. The present case is analogous to the situation in *United States* v. *French*, 628 F. 2d 1069 (8th Cir.), *cert. denied*, 449 U. S. 956 (1980). In *French*, a St. Louis city marshal was convicted under the Hobbs Act of accepting reduced settlements for forfeited bail bonds owed the city in return for cash payments. The bail bondsman acted as an agent for a New York insurance firm. The court found that "the moment the extortionate payment was made, there was an effect on interstate commerce." 628 F. 2d at 1078.[6]

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[5]The transaction between Pugh and Hollis could also be characterized as receipt by Pugh of $5000 followed by a $2100 payment from Pugh to Hollis. The $2100 payment to Hollis was also commerce, however, since Hollis immediately took the money from Florida back to Kentucky. The practical effect of the extortion is the same under either characterization: instead of $5000 moving from Kentucky to Florida, only $2900 ends up in Florida.

[6]*French* is not exactly on point with the present case, since in *French* there was no proof that the bondsman was acting for the out-of-state firm with respect to the particular bonds involved. The *French* court therefore had to rely on extortion from a business engaged in commerce rather than extortion of a payment itself in commerce. However, the fact that the *French* court noted that lack of proof suggests that the court could have found its decision easier had the bonds been underwritten by the out-of-state firm.

There is nothing in the legislative history of the Hobbs Act that would require an effect on commerce subsequent to, rather than contemporaneous with, the extortion. The House Committee on the Judiciary said in its report on the proposed Act, "those persons who have been impeding interstate commerce and levying tribute from freeborn American citizens engaged in interstate commerce shall not be permitted to continue such practices." H.R. Rep. No. 238, 79th Cong., 2d Sess., *reprinted in* 1946 U. S. Code Congressional Service 1360, 1370. Levying tribute from persons engaged in interstate commerce would normally include levying tribute from one engaged in commerce at the moment the levy is exacted. Congressional intent to include a broad range of effects on commerce is even clearer when the language of the Anti-Racketeering Act of 1934, the Hobbs Act's predecessor, is considered. That statute penalized: "Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce [extorts]." 48 Stat. 979. This language is broad enough to include even effects on commerce that occur before the extortion. For instance, Hollis' agreement to pay Pugh for reading x-rays in Florida was an act affecting commerce, and Hollis subsequent extortion could be said to be in connection with that act. The Hobbs Act was intended to broaden, not contract, the scope of the earlier anti-racketeering law. *United States* v. *Staszcuk,* 517 F. 2d 53, 56-57 (7th Cir.) (en banc), *cert. denied,* 423 U. S. 837 (1975). We need not rely on the 1934 Act, however, since the language of the current statute is broad enough to include effects on commerce contemporaneous

with an extortion. The evidence against Hollis was sufficient to satisfy the commerce element of the Hobb Act.[7]

Hollis also contends that a portion of the District Court's charge to the jury was impermissibly coercive and that the government's actions during discovery require reversal. We have considered these contentions and find them without merit.

Accordingly, the judgment of the District Court is affirmed.

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[7]We need not consider whether the acts that formed the bases for the Travel Act violations (telephone calls and an airplane trip to Florida made by Hollis) or the possibility that the extortion may have dissuaded Pugh from re-entering commerce could constitute a sufficient effect on commerce.

## APPENDIX B

# UNITED STATES COURT OF APPEALS

### FOR THE SIXTH CIRCUIT

**No. 83-5071**

---

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee*

*v.*

KENNETH E. HOLLIS, - - - *Defendant-Appellant*

---

**ORDER**—Filed March 2, 1984

Before: ENGEL and KENNEDY, Circuit Judges; and MORTON, Chief District Judge*

The Court not having favored rehearing en banc in the above case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

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*Honorable L. Clure Morton, Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

## APPENDIX C

# UNITED STATES COURT OF APPEALS

### FOR THE SIXTH CIRCUIT

**No. 83-5071**

---

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee*

*v.*

KENNETH E. HOLLIS, - - - *Defendant-Appellant*

---

**ORDER**—Filed March 15, 1984

Upon consideration of the appellant's motion to stay the mandate pending application for writ of certiorari,

IT IS ORDERED that the motion be and it is hereby granted until April 16, 1984.

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/s/ John P. Hehman, Clerk

## APPENDIX D

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Criminal No. 82-5

UNITED STATES OF AMERICA, - - - - *Plaintiff*

*v.*

KENNETH E. HOLLIS, - - - - - *Defendant*

## BILL OF PARTICULARS

* * * * * *

Comes the United States of America, by counsel, and files the folowing Bill of Particulars:

1. *Interstate Commerce*

Dr. Travis Pugh, III was at the time of the alleged extortion a medical doctor who was engaged in interstate commerce in the extent that he had earlier contracted with the State of Kentucky for the delivery of certain professional services under the State's Black Lung Program. Dr. Pugh resided and maintained a practice in Ft. Myers, Florida. He was mailed medical files, including x-rays from the Kentucky Department of Labor and the Special Fund of the Workmen's Compensation Board, which he returned by mail to the State after they had been examined and read. Dr. Pugh traveled on several occasions from Florida to Kentucky, and returned, for the specific purpose of giving medical depositions with regard to his reading of the x-rays. In addition, it was sometimes necessary for Dr.

Pugh to make and receive interstate telephone calls in connection with his work with the State of Kentucky.

The evidence will show that the defendant made two or more interstate telephone calls between Kentucky and Florida. On the date described in the indictment, the defendant himself twice flew between the two states. Each of these actions was in and affected interstate commerce.

Some of the individual x-rays which were read or reread by Dr. Pugh had been made by other medical professionals outside the State of Kentucky, e.g., Ohio.

Further, the Commonwealth of Kentucky was itself heavily involved, directly and indirectly, in interstate commerce. Its finances and funds were deposited in one or more banks which invested the funds out-of-state. The State had employees who resided out-of-state and traveled interstate between their homes and their jobs. The State was involved with numerous out-of-state vendors and contractors. A number of the employees and physicians connected with the Black Lung Program traveled to out-of-state seminars for special training.

2. *Extortion and Bribery statutes*

(a) *United States:* 18 U.S.C. § 1951 (Hobbs Act).

(b) *Kentucky:* K.R.S. 514.080(1)(d) (Theft by Extortion); 521.020(1)(b) (Bribery of Public Servant); 522.020 (Official Misconduct in the First Degree).

(c) *Florida:* Title 44 § 836.05 (Threats; extortion).

The above Bill is made in good faith and with the view that the defendant is entitled to notice of the facts and allegations contained herein. The United States expressly reserves its right to supplement or amend the Bill, with

leave of Court, as provided by Rule 7(f), should additional or contrary information become known to the government.

Respectfully submitted,

Louis DeFalaise
United States Attorney

By: _____
/s/ C. Cleveland Gambill
Assistant U. S. Attorney

CERTIFICATE

I hereby certify that the foregoing Bill of Particulars was served upon the defendant by mailing a true copy thereof to his attorney of record, Hon. James A. Shuffett of Shuffett, Kenton, Curry & Karem, 109 North Mill Street, Lexington, Kentucky 40507-1158, this the 20th day of September, 1982.

_____
/s/ C. Cleveland Gambill

## APPENDIX E

## THE GOVERNMENT'S THEORIES ADVANCED ON MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ITS CASE-IN-CHIEF

"With respect to the effect on interstate commerce, the Sixth Circuit has acknowledged that all we have to prove is a minimal effect on commerce, and that . . . holding is found in the case of *United States* v. *Hardy,* [sic] 563 F. 2d 299 at Pages 301, 302. It's a 1977 case, and there are other cases from the Sixth Circuit on that aspect.

I think that Mr. Shuffett, with all respect, attempted to draw too fine a line as to the interstate commerce aspect of this case. This check was written perhaps in March of 1977, and it did not get to him until October. During that time, according to the testimony in this case, Dr. Pugh was traveling to and from Florida up to Kentucky, and the check was in fact brought in interstate commerce, and we submit, Your Honor, that the interstate commerce was affected. He was involved very much in a business which was based in Florida at time [sic]and in Kentucky at times, and he traveled freely between the two states during the time period of when he was working for the I & D Center and when he was on his own."

(Tr., 1/5/83, pp. 498-99).

## APPENDIX F

## MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE

Mr. Shuffett: Your Honor, we would like to renew our motion for judgment of acquittal made at the close of the prosecution's case.

The Court: All right. Let the motion be OVERRULED. (Tr. 1/6/83, pp. 813-14).

## APPENDIX G

## ARGUMENTS ON MOTION FOR A NEW TRIAL

### Defendant's Argument

Mr. Shuffett: . . . .

The first area is the commerce element or the four offenses. Your Honor will recall that the first count, the Hobbs Act, requires that commerce be affected to some minimal amount.

Counts 2, 3 and 4 under the Travel Act require traveling in interstate commerce or use of an interstate facility. Now, in this particular case, there was no commerce affected, as shown by the proof, other than the actual travel and the use of the facility referred to in Counts 2, 3 and 4.

It is the defendant's position that there has to be other commerce in order for Count 1 to have had prima facie proof presented. Otherwise, it is the same offense, and the block part attached ought to block the prosecution of all, or of more than one at least, particularly the first count, which was in effect superseded by the specific offenses charged in 2, 3, and 4.

Now, the prosecution probably . . . they probably could, I don't know . . . could have proved that Dr. Pugh was engaged in interstate commerce in some manner. It's possible that they couldn't prove it. But, either way, they didn't prove it. There was no testimony concerning Dr. Pugh, the alleged victim, being in any manner engaged in interstate commerce. They did not even prove that he ever bought a box of paper clips from Indiana. Now, maybe the reason they didn't prove that was because he was operating through a Professional Service Corporation, and therefore, they could not prove that the partciular individual was interstate commerce. Maybe his corporation was involved, but he, himself, may not have been.

Either way, they did not prove it.

We submit that the commerce of interstate travel, for use of interstate facilities required in Counts 2, 3 and 4 cannot in this case be the commerce affected that is required under Count 1, the Hobbs Act.
(Tr. 2/1/83, pp. 2-4).

**The Government's Argument**

Mr. Trevey: Taking up the first of his arguments, that of Interstate Commerce . . . and, before I argue any of this, I think, Detective Henderson here so advised me that he thought Mr. Shuffett brought up most of these arguments at the close of, number one, the government's case, and then, two, at the close of his case. Similar grounds were argued at the time and overruled by the Court.

But, just to mention a few of the things that I recall during the short period of time that I was sitting in the trial of the case, as far as his affect on commerce was concerned, we established that the telephones were used extensively. The calls of October the 24th and 26th, which set up the extortion from Dr. Pugh. The use of the airlines, which was admitted by the Defendant Hollis. The United States also established that there were other doctors utilized by the Department of Labor which practiced outside of the Commonwealth of Kentucky; and, even the money that was paid on this case to Dr. Pugh, that money was earned by Dr. Pugh for reading of the x-rays while he was in the State of Florida.

In addition to that, during the period the conspiracy was established on testimony, I think, that Dr. Pugh traveled extensively from Florida to Bowling Green, after he read the x-rays in Florida, to give depositions in Bowling Green.

He makes some argument as to economic law in his motion. I don't think he argued a great deal about it here

this morning. But, the United States did establish, and Dr. Pugh's testimony was that he was afraid he wouldn't get any money at all unless he made this $2,100.00 payment to Mr. Hollis, and that he was afraid of Mr. Hollis in his position, inasmuch as Mr. Hollis was General Counsel for the Department of Human Resources; he did testify that he was afraid of his position.

(Tr., 2/1/83, pp. 12-14).

The Court: All right. Gentlemen, I believe, the case was fairly tried, and I don't believe there's any ground to upset the verdict of the jury. The motion for a judgment of acquittal or in the alternative for a new trial is OVERRULED.

(Tr., 2/1/83, p. 17).

(2)

No. 83-1788

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH E. HOLLIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

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## QUESTIONS PRESENTED

1. Whether the court of appeals affirmed on a theory of Hobbs Act jurisdiction that differed from the theory presented to the jury.

2. Whether interstate commerce was adversely affected by petitioner's extortion of a portion of the fee paid by the Commonwealth of Kentucky to a Florida doctor for services rendered.

3. Whether petitioner's Hobbs Act conviction should be vacated because the evidence proving three Travel Act violations also supported the Hobbs Act charge.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 29-36) is reported at 725 F.2d 377.

### JURISDICTION

The judgment of the court of appeals was entered on January 16, 1984. A petition for rehearing was denied on March 2, 1984 (Pet. App. 37). The petition for a writ of certiorari was filed on May 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on one count of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and on three counts of interstate travel or use of an interstate facility to perform extortion, in

violation of the Travel Act, 18 U.S.C. 1952. He was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed (Pet. App. 29-36).

1. As petitioner agrees (Pet. 4-5), the evidence at trial is accurately summarized in the court of appeals' opinion (Pet. App. 30-31). It shows that in his capacity as General Counsel for the Kentucky Department of Labor, petitioner hired Dr. Travis Pugh, a medical doctor practicing in Fort Myers, Florida, to read chest x-rays in black lung cases. Initially, Dr. Pugh established a center in Kentucky from which he worked. When he discovered that the caseload was too small to sustain the office, however, Dr. Pugh returned to his Florida practice. From there, he continued to read and submit reports on x-rays sent to him through the mail. He also traveled occasionally to Kentucky to give depositions concerning the x-rays. Dr. Pugh billed the Department of Labor for his services.

Petitioner ordered the fiscal unit of the Department to send Dr. Pugh's paychecks directly to petitioner. Pugh's final paycheck, in the amount of $5,000, was issued in March 1977 by the fiscal unit. Petitioner held the check until the following October. In the latter part of October, petitioner twice telephoned Dr. Pugh.[1] Petitioner threatened that he would not give Pugh the check unless the doctor divided the amount with him. Pugh needed the money and finally agreed to give petitioner $2,100 of the proceeds. On October 28, 1977, petitioner flew from Kentucky to Florida with the check, and Pugh met petitioner at the airport.[2] They drove to the doctor's bank. While

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[1]These two calls formed the basis of two of petitioner's Travel Act convictions.

[2]Petitioner's trip to Florida on October 28, 1977, formed the basis of the third Travel Act count.

petitioner waited outside, Dr. Pugh deposited the $5,000 check and withdrew $2,100 in cash. He immediately gave the cash to petitioner and took petitioner back to the airport for his return flight to Kentucky.

2. Prior to trial, in a bill of particulars, the government informed defense counsel how it intended to show that the charged extortion affected interstate commerce for the purpose of proving the jurisdictional element of the Hobbs Act count (Pet. App. 39):

> Dr. Travis Pugh, III was at the time of the alleged extortion a medical doctor who was engaged in interstate commerce in the extent that he had earlier contracted with the State of Kentucky for the delivery of certain professional services under the State's Black Lung Program. Dr. Pugh resided and maintained a practice in Ft. Myers, Florida.

The government elaborated on this theory in response to petitioner's motion for a judgment of acquittal at the close of the government's case-in-chief (1/5/83 Tr. 498-499):

> [The $5,000] check was written perhaps in March of 1977, and it did not get to [Dr. Pugh] until October. During that time, according to the testimony in this case, Dr. Pugh was traveling to and from Florida up to Kentucky, and the check was in fact brought in interstate commerce, and we submit, Your Honor, that the interstate commerce was affected.

Thereafter, the district court denied petitioner's motion for judgment of acquittal (*id.* at 503). Before submitting the case to the jury, the district court instructed that the Hobbs Act requires proof that "interstate commerce was delayed, interrupted or adversely affected" (1/7/83 Tr. 64). The court further charged (*id.* at 65) (emphasis added):

> Proof beyond a reasonable doubt that interstate commerce was affected even to a minimal degree is sufficient. Interstate commerce may be adversely affected within the meaning of the instructions by an increase in the cost of doing business in interstate commerce *or by a reduction of the profits from interstate business.*

Petitioner did not object to this instruction (see *id.* at 65, 76). Subsequently, the jury found petitioner guilty on the Hobbs Act count as well as the three Travel Act counts.

3. The court of appeals affirmed (Pet. App. 29-36). With respect to petitioner's Hobbs Act conviction, it ruled that the evidence was sufficient to prove that interstate commerce had been affected by the extortion (*id.* at 33-34) (footnote omitted):

> Such a direct effect on commerce is evident in the present case. The payments made by the Kentucky Department of Labor to Pugh for his services constituted interstate commerce. Payment for the services was an essential part of the interstate transaction. But for the extortion, Pugh would have been paid $5000 for the final group of depositions. Because of the extortion, Pugh only received $2100. [Petitioner's] extortion therefore directly affected the amount of payment that moved in interstate commerce.

The court rejected petitioner's argument that commerce was not affected because Dr. Pugh was no longer providing services to the Kentucky Department of Labor at the time that petitioner extorted from Pugh a portion of his final paycheck. The court first noted that the interstate transaction and the extortion need not be simultaneous (*id.* at 34). Nevertheless, the court held that here, "the victim *was* engaged in an interstate transaction at the moment of the extortion, albeit in the payment end rather than the delivery end of the transaction" (*ibid.*) (emphasis in original). And

after reviewing the legislative history of the Hobbs Act, the court below remarked that the effect on commerce may precede the extortion (*id.* at 35):

> For instance, [petitioner's] agreement to pay Pugh for reading x-rays in Florida was an act affecting commerce, and [petitioner's] subsequent extortion could be said to be in connection with that act.

In any event, the court concluded that "the language of the current statute is broad enough to include effects on commerce contemporaneous with an extortion" and that the evidence was sufficient to satisfy the commerce element of the Hobbs Act here (*id.* at 35-36).

## ARGUMENT

1. Petitioner asserts (Pet. 8-16) that the court of appeals affirmed his conviction on a theory of Hobbs Act jurisdiction that was not presented to the jury.[3] See *Dunn* v. *United States*, 442 U.S. 100 (1979). We do not disagree with petitioner's statement of legal principles on this point. However, his argument is based on an inaccurate portrayal of the government's theory of the case and the opinion of the court of appeals. Petitioner raises no significant legal question that would warrant this Court's review; at most, he raises the fact-specific question whether the basis for the court of appeals' affirmance of Hobbs Act jurisdiction was consistent with the theory put to the jury. As to that question, we see no inconsistency whatsoever.

As the record shows, the government maintained from the outset that the services performed by Dr. Pugh for the Kentucky Department of Labor constituted interstate commerce. As the prosecutor argued, the services rendered

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[3]The Hobbs Act, 18 U.S.C. 1951, imposes criminal sanctions on any person who "in any way or degree obstructs, delays, or affects commerce * * * by robbery or extortion * * *."

by Pugh were in interstate commerce, and his $5,000 paycheck "was in fact brought in interstate commerce" (1/5/83 Tr. 498-499). In the same vein, the district court charged the jury that Hobbs Act jurisdiction was established if the extortion caused "a reduction of the profits from interstate business" (1/7/83 Tr. 65). On this precise theory, the court of appeals affirmed (Pet. App. 33-34):

> But for the extortion, Pugh would have been paid $5000 for the final group of depositions. Because of the extortion, Pugh only received $2100. [Petitioner's] extortion therefore directly affected the amount of payment that moved in interstate commerce.

Because there was no discrepancy between the theory presented to the jury and the theory on which petitioner's conviction was affirmed, there is no reason to discuss the many cases cited by petitioner requiring an identity of theories.

Petitioner suggests (Pet. 20-21) that certiorari should be granted here to establish guidelines that would require the government "to articulate the reasons it contends commerce is affected" and to require that the trial court rule on the sufficiency of the evidence before submitting the case to the jury. But that is exactly what occurred in this case. Petitioner moved for a judgment of acquittal on the basis that the interstate commerce element of a Hobbs Act violation had not been proved. The government responded by arguing that both the services rendered by Pugh and the payments received from the Kentucky Department of Labor constituted interstate commerce that was adversely affected by petitioner's extortionate demand (see 1/5/83 Tr. 498-499). Following the government's presentation, the district court ruled that enough evidence supported the government's theory to submit the case to the jury.

2. Petitioner further contends (Pet. 22) that by upholding his Hobbs Act conviction the court of appeals has extended the Hobbs Act to embrace all extortion, because "there is always a likelihood that the extortionate payment will end up in interstate commerce." Petitioner misses the point. Hobbs Act jurisdiction in this case does not depend solely on the fact that the extortionate payment eventually crossed state lines; the entire transaction was interstate. As the court below explained (Pet. App. 32), Dr. Pugh read x-rays at his home in Florida for the Kentucky Department of Labor; he mailed his reports to Kentucky. He also traveled to Kentucky for depositions. In addition to these interstate services, Pugh's paychecks were transmitted from Kentucky to Florida. Thus, the commerce in this case was the performance of services in exchange for fees. And as the court below concluded (Pet. App. 33-34), that commerce was adversely affected by the extortion because it decreased the payment received by Dr. Pugh for his services. The effect on commerce was direct and substantial. There is no reason to speculate that the opinion of the court of appeals might cause an unwarranted extension of the Hobbs Act in some future case.[4] Should petitioner's prediction prove accurate, review by this Court is available at that time.

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[4]We note that the Hobbs Act extends even to those cases in which the effect on commerce is de minimis. See *United States* v. *Jarabek*, 726 F.2d 889, 900-901 (1st Cir. 1984); *United States* v. *Boston*, 718 F.2d 1511, 1516-1517 (10th Cir. 1983), cert. denied, No. 83-1701 (May 14, 1984); *United States* v. *Boulahanis*, 677 F.2d 586, 589-590 (7th Cir.), cert. denied, 459 U.S. 1016 (1982); *United States* v. *Calder*, 641 F.2d 76, 78 (2d Cir.), cert. denied, 451 U.S. 912 (1981); *United States* v. *Chiantese*, 582 F.2d 974, 980-981 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979). The Hobbs Act prohibits extortion that interferes with commerce "in any way or degree." 18 U.S.C. 1951(a); *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). Congress intended the Act to reach as broadly as the Commerce Clause permits (*United States* v. *Culbert*, 435 U.S. 371, 373 (1978); *Stirone* v. *United States*, *supra*). Consequently, the evidence here surpassed by far that needed to prove Hobbs Act jurisdiction.

3. Finally, petitioner claims (Pet. 25-26) that his Hobbs Act conviction should be reversed because the same acts that formed the basis of his Travel Act (18 U.S.C. 1952) convictions (two telephone calls to Pugh and petitioner's trip to Florida with the $5,000 check) also established the interstate commerce element of the Hobbs Act charge. We do not understand the gravamen of petitioners contention. Since the Hobbs Act can be violated in the absence of any conduct that would also violate the Travel Act, there is no reason why there could be no prosecution under both statutes where the facts of the case warrant it. Petitioner supplies no reason for this Court to address this undefined issue, which the court below chose to avoid (see Pet. App. 36 n.7).

In any event, Hobbs Act jurisdiction in this case did not rest solely on the acts of petitioner that also violated the Travel Act. Rather, it rested on Dr. Pugh's interstate business. As explained above, the flow of services and payments across state lines in this case constituted commerce. It did not matter for purposes of establishing jurisdiction whether Pugh received his check in the mail or whether petitioner brought it to him. In either case, Pugh's business was affected by petitioner's extortionate demand because he netted less for his services than he was entitled to.

In sum, none of petitioner's challenges to his Hobbs Act conviction warrant further review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1984

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